

**SENTENCED TO A PAINFUL,  
PREVENTABLE DEATH: THE CHANGING  
LANDSCAPE SURROUNDING THE  
HEPATITIS C EPIDEMIC WITHIN THE  
JUSTICE SYSTEM AND WHY INMATES  
MUST RECEIVE THE CURE**

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## INTRODUCTION

“You’re going to let me die from this.”<sup>1</sup>

Inmates across the United States sit on death row. No, a jury has not sentenced them to be executed. They are dying while they wait to receive treatment for hepatitis C, a disease that is now almost completely curable.<sup>2</sup> They wait, helpless, while their loved ones on the outside campaign on their behalf.<sup>3</sup> Commercials blare on the common room television, warning those on the outside to not delay treatment because hepatitis C is a silent killer.<sup>4</sup> They attend chronic care appointments where medical professionals

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<sup>1</sup> Elizabeth Weill-Greenberg, *You’re Going to Let Me Die From This’: Prisoners Fight to Access a Hepatitis-C Cure*, THE NATION (Jan. 25, 2019), <https://www.thenation.com/article/prisons-hepatitis-c-treatment/> [<https://perma.cc/N4FP-JTYB>].

<sup>2</sup> See *Hepatitis C*, WORLD HEALTH ORG. (July 27, 2020), <https://www.who.int/news-room/fact-sheets/detail/hepatitis-c> [<https://perma.cc/Y2CM-BEBH>].

<sup>3</sup> Alex Smith, *Locked Up and Untreated: One Missouri Inmate’s Quest for Hepatitis C Treatment*, ST. LOUIS PUB. RADIO (May 9, 2018, 5:00 AM), <https://news.stlpublicradio.org/post/locked-and-untreated-one-missouri-inmate-s-quest-hepatitis-c-treatment#stream/0> [<https://perma.cc/PY89-Z7KN>].

<sup>4</sup> Weill-Greenberg, *supra* note 1.

inform them that their liver is deteriorating but that they are not sick enough to be eligible for treatment.<sup>5</sup> They are watching their friends die a slow, painful death—a death they know awaits them unless they are released or receive treatment before it is too late.<sup>6</sup>

This Comment will discuss the new developments in hepatitis C treatment and how those developments have affected treatment within the prison population and the litigation landscape against healthcare providers for failing to treat prisoners with hepatitis C. This Comment argues that regardless of any budgetary concerns, prisoners should be offered life-saving treatment to prevent the continuation of needless deaths from this curable disease because they are human beings worthy of dignity and respect. In the alternative, if one does not accept that prisoners retain human dignity, this Comment explains that treatment is constitutionally necessary under the Eighth Amendment, both in its prohibition of cruel and unusual punishment and the affirmative duty a state has to provide basic care to those in its custody. Further, the neglect of hepatitis C in the prison system creates a public health concern for all members of the community. This Comment illustrates the cost of the prisons' severe negligence, both in monetary terms and in the cost of dignity to prisoners and society itself.

This Comment argues for dramatic reforms concerning the treatment of prisoners with hepatitis C; specifically, courts should continue to find Eighth Amendment violations and grant preliminary injunctions requiring prisons to treat inmates, legislators should draft laws focused on the inherent human dignity of inmates, and prison healthcare providers should create policies that ensure early screening and prompt administration of direct-acting antiviral (“DAA”) drugs.

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<sup>5</sup> See Smith, *supra* note 3. Inmates like the man profiled in this Comment have hepatitis C but are not considered “Priority 1,” and therefore they will not receive treatment until their disease progresses further. *See id.*

<sup>6</sup> See *infra* Part II.A Personification of the Epidemic.

## I. A PERSONIFICATION OF THE EPIDEMIC

Donnie entered the prison system in 1995.<sup>7</sup> He has spent the last eleven years of his incarceration on honor status and participating in community outreach programs.<sup>8</sup> Donnie has been with his wife for over thirty years.<sup>9</sup> His family, which also includes his children, grandchildren, father, and siblings, visit him often, and he talks to them every day.<sup>10</sup> Donnie was diagnosed with hepatitis C in 1999.<sup>11</sup> He was only tested because he was caught receiving an illicit tattoo, and one of the sanctions for that offense is being tested for hepatitis C.<sup>12</sup> He does not know when he contracted hepatitis C.<sup>13</sup> Upon diagnosis, he received no information about the disease from prison healthcare providers; he learned about hepatitis C through his own research.<sup>14</sup>

Donnie received interferon medication after he submitted a request to the prison in 2006, back when interferon drugs, with a low cure rate and debilitating side effects,<sup>15</sup> were the only treatment available for hepatitis C.<sup>16</sup> At the time, he already had mild fibrosis of the liver. Donnie suffered severe side effects while taking interferons; he “felt like [he] was dying.”<sup>17</sup> He and his

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<sup>7</sup> The following narrative comes from sworn testimony from a preliminary injunction hearing held in the Western District of Missouri. Notes on Preliminary Injunction Hearing, *Postawko v. Corizon Medical Services*, (No. 2:16-cv-04219-NKL) (Aug. 12-15, 2019) (on file with author). The witness, an inmate incarcerated within the Missouri Department of Corrections (“MDOC”), is a plaintiff in the suit. The hearing took place in August 2019. In August 2020, the parties reached a settlement, and MDOC and Corizon were ordered to treat prisoners with hepatitis C. See *Missouri Department of Corrections Required to Provide Lifesaving Hepatitis C Treatment to Thousands Behind Bars*, ACLU MISSOURI (August 21, 2020), <https://www.aclu-mo.org/en/press-releases/missouri-department-corrections-required-provide-lifesaving-hepatitis-c-treatment> [<https://perma.cc/MYQ5-ECF9>].

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> See Susan J. Bliss, *Interferons for Hepatitis C: Understanding the Long-Term Side Effects*, HEALTHLINE (Feb. 1, 2019), <https://www.healthline.com/health/hepatitis-c/interferons-long-term-effects> [<https://perma.cc/T4RS-7K5P>].

<sup>16</sup> Notes on Preliminary Injunction Hearing, *supra* note 7.

<sup>17</sup> *Id.*

doctor decided to discontinue the interferon drugs and wait for a better treatment to become available.<sup>18</sup>

Because of Donnie's diagnosis, he attends chronic care appointments, which happen anywhere from every three months, every six months, or only once a year.<sup>19</sup> A chronic care visit requires him to go to the prison's medical office at 4:40 AM and wait in line to have his blood drawn.<sup>20</sup> He does not receive any treatment at this appointment. About a month later, he will go over the results with his doctor.<sup>21</sup> Donnie has never received a printed copy of his medical records or test results; he has been told he will have to pay \$15.35 per page if he wants them.<sup>22</sup>

Donnie feels the effects of hepatitis C every day. He often feels fatigued and cannot work out as he did in the past.<sup>23</sup> He also experiences sharp pains in his side and lower back pain.<sup>24</sup> He is generally uncomfortable; sitting, standing, and walking bothers him.<sup>25</sup> When Donnie learned of the new treatment available for hepatitis C, he requested treatment through the prison's grievance process.<sup>26</sup> The prison told him he was ineligible for treatment.<sup>27</sup> He was discouraged, frustrated, and afraid. He has been told by a prison doctor that if it were up to him, he would treat everyone, but his hands are tied.<sup>28</sup> Another doctor told him that lawsuits do no good and are thrown in the trash.<sup>29</sup>

Three of Donnie's friends have died from hepatitis C complications, the first back in 2001.<sup>30</sup> He has watched their skin turn yellow and their abdomens swell.<sup>31</sup> He has seen them deteriorate, looking "death in the face," knowing the same fate awaits him if nothing is done. Watching his friends die of a

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<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

disease that he has, that remains untreated, was “hard and discouraging.”<sup>32</sup> He is afraid.<sup>33</sup> He is afraid that he will die and that he will not be there for his family.<sup>34</sup> If offered DAA medication to cure his hepatitis C, he would “absolutely” take it, despite the fact he discontinued interferon treatment.<sup>35</sup>

Countless inmates in Donnie’s position are providing similar testimony in litigation all across the country. Hundreds of thousands more are suffering from hepatitis C: physically, as their liver begins to fail, and mentally, as they know they are facing a painful death unless the prison decides to treat them. This suffering is preventable, unconstitutional, and ignores the inherent dignity of human beings.

## II. OVERVIEW OF HEPATITIS C

Hepatitis C kills more Americans each day than HIV and sixty other infectious diseases combined, making it the deadliest infectious disease in the United States.<sup>36</sup> It is a viral infection, caused by the hepatitis C virus (“HCV”) that affects the liver and can result in serious, life-threatening complications.<sup>37</sup> Hepatitis C is both the number one cause for liver transplants and of liver disease in the United States.<sup>38</sup>

An individual with chronic hepatitis C may be asymptomatic for years and not experience complications until their liver begins to fail, leading some to refer to hepatitis C as a “silent killer.”<sup>39</sup> “[T]here is not very good concordance between physical systems” and the actual state of the liver, meaning that physical symptoms are not an accurate reflection of the liver damage one has

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<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> Theresa C. Mahfood, *Solvaldi: The High Price for a Cure*, 27 ANNALS HEALTH L. 1, 1 (2018).

<sup>37</sup> *See id.* at 5.

<sup>38</sup> *Abu-Jamal v. Wetzel*, 3:16-CV-2000, 2017 WL 34700, at \*14 (M.D. Pa. Jan. 3, 2017).

<sup>39</sup> Dr. Gottfried Hirschall, *There’s a Reason Viral Hepatitis Has Been Dubbed the “Silent Killer,”* WORLD HEALTH ORG. (Sep. 2, 2015), <https://www.who.int/mediacentre/commentaries/viral-hepatitis/en/> [<https://perma.cc/K8RL-T728>].

suffered.<sup>40</sup> Progression of liver damage is unpredictable, with no way of knowing how quickly an individual will suffer damage, making it imperative that medication is administered as soon as possible regardless of the current progression of the disease.<sup>41</sup> If a chronic hepatitis C infection is left untreated, it can result in cirrhosis, or liver scarring, which may lead to horrific complications and ultimately death.<sup>42</sup> Enlarged veins in the esophagus or stomach, caused from elevated pressure, can burst and bleed.<sup>43</sup> Resistance to insulin can lead to Type 2 diabetes.<sup>44</sup> One may experience kidney and lung failure, liver cancer, or a buildup of toxins in the brain.<sup>45</sup> Overall, problems resulting from fighting infection can lead to a plethora of other health issues.<sup>46</sup>

Because an individual with hepatitis C infection may not present symptoms until severe liver damage has occurred, the Centers for Disease Control recommends that those who have any “risk factors” for hepatitis C be screened for the disease.<sup>47</sup> Risk factors include intravenous drug use, receiving a tattoo with unsterilized equipment, blood transfusions before 1992, and prior incarceration.<sup>48</sup> Those born in the “birth cohort” between the years of 1945 and 1965 are at a much greater risk of having hepatitis C.<sup>49</sup>

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<sup>40</sup> See *Abu-Jamal*, 2017 WL 34700, at \*3.

<sup>41</sup> See *id.*

<sup>42</sup> *Hepatitis C*, MAYO CLINIC, <https://www.mayoclinic.org/diseases-conditions/hepatitis-c/symptoms-causes/syc-20354278> [<https://perma.cc/KPR4-QREH>] (last visited Dec. 12, 2019); See also Susan Simon, *Varices From Hepatitis C: A Complication of Cirrhosis*, HEPATITISC.NET (July 6, 2016), <https://hepatitisc.net/living/varices-complication-cirrhosis/> [<https://perma.cc/UZ7B-PB3R>].

<sup>43</sup> Simon, *supra* note 42.

<sup>44</sup> *When Hepatitis C Worsens*, WEBMD, <https://www.webmd.com/hepatitis/complications-hep-c#1> [<https://perma.cc/3JRC-M6MN>] (last visited Jan. 20, 2020).

<sup>45</sup> *Id.*

<sup>46</sup> See *id.*

<sup>47</sup> Kevin W. Bliss, *Prisoners Seek Comprehensive Hepatitis C Testing and Treatment*, PRISON LEGAL NEWS (June 5, 2019), <https://www.prisonlegalnews.org/news/2019/jun/5/prisoners-seek-comprehensive-hepatitis-c-testing-and-treatment/> [<https://perma.cc/FH89-4Z8V>].

<sup>48</sup> See MAYO CLINIC, *supra* note 42.

<sup>49</sup> *Id.*

An infection of hepatitis C does not always become chronic; some individuals clear HCV on their own after the acute phase.<sup>50</sup> If the body does not clear the virus on its own, which happens in about seventy-five to eighty-five percent of cases, treatment is needed to prevent irreparable liver damage.<sup>51</sup> If a patient is diagnosed with hepatitis C, the doctor will prescribe an oral medication, called a direct-acting antiviral (“DAA”), that must be taken daily for a period of several months.<sup>52</sup> The medical community considers DAAs to be the standard of care for treating patients with hepatitis C,<sup>53</sup> and the American Association for the Study of Liver Diseases and the Infectious Diseases of America’s HCV guidance panel recommends that every individual “with chronic hepatitis C have access to the cure.”<sup>54</sup>

#### A. Past Treatment of Hepatitis C

The first HCV treatment was introduced in 1991 in the form of interferon drugs.<sup>55</sup> Interferons are proteins in the human body that interfere with a virus’s ability to reproduce.<sup>56</sup> The treatment, available as an injection, can last six to twelve months and comes with a large array of side effects.<sup>57</sup> Many of these side effects are so severe that many patients are unable to successfully complete treatment.<sup>58</sup> In addition to more common side effects, such as flu-like symptoms, vomiting, diarrhea, and trouble sleeping, interferons also have life-threatening side effects, including

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<sup>50</sup> See WORLD HEALTH ORG., *supra* note 2.

<sup>51</sup> See Weill-Greenberg, *supra* note 1.

<sup>52</sup> See Bliss, *supra* note 15.

<sup>53</sup> *Id.*

<sup>54</sup> Siraphob Thanthong-Knight, *State Prisons Fail to Offer Cure To 144,000 Inmates with Deadly Hepatitis C*, WASH. POST (July 9, 2018), [https://www.washingtonpost.com/national/health-science/state-prisons-fail-to-offer-cure-to-144000-inmates-with-deadly-hepatitis-c/2018/07/09/99790838-8358-11e8-9e06-4db52ac42e05\\_story.html](https://www.washingtonpost.com/national/health-science/state-prisons-fail-to-offer-cure-to-144000-inmates-with-deadly-hepatitis-c/2018/07/09/99790838-8358-11e8-9e06-4db52ac42e05_story.html) [<https://perma.cc/V5AC-93XD>].

<sup>55</sup> Susan York Morris, *The History of Hepatitis C: A Timeline*, HEALTHLINE (Dec. 18, 2016), <https://www.healthline.com/health/hepatitis-c/hepatitis-c-history#1> [<https://perma.cc/E8WS-3FYW>].

<sup>56</sup> *Id.*

<sup>57</sup> Bliss, *supra* note 15.

<sup>58</sup> Notes on Preliminary Injunction Hearing, *supra* note 7. For example, Donnie’s side effects were so severe that he and his doctor made the decision to discontinue interferon treatment. *Id.*

increased infections, autoimmune diseases, mood disorders, and strokes.<sup>59</sup> Even if a patient suffers through the side effects and completes a full course of treatment, interferons are not always effective; the cure rate is only about forty to fifty percent.<sup>60</sup>

### *B. Current Treatment of Hepatitis C*

In 2013, the FDA approved a new treatment regimen for hepatitis C called direct-acting antivirals (“DAA”).<sup>61</sup> The goal of anti-viral treatment is to attain “a sustained virological response (SVR), defined as undetectable HCV virus in the blood.”<sup>62</sup> If SVR is achieved, the result may be a significant decrease in “the risk of disease progression . . . and death.”<sup>63</sup> The treatment course for DAAs is much shorter, only a few weeks, and is available in pill form.<sup>64</sup> DAAs also have far fewer side effects than interferons.<sup>65</sup> Although the effectiveness of treatment depends on the genotype of the HCV, DAAs are overall much more effective than interferons, with some genotypes experiencing a cure rate of ninety-five percent.<sup>66</sup> However, a delay in treatment may decrease the benefit of reaching SVR.<sup>67</sup> As these drugs have been on the market a short amount of time, they can be extremely expensive per round of treatment.<sup>68</sup> The cost, however, has decreased significantly, plummeting from \$90,000 per course of treatment when first available to \$20,000.<sup>69</sup>

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<sup>59</sup> Bliss, *supra* note 15.

<sup>60</sup> See *Abu-Jamal v. Wetzels*, 3:16-CV-2000, 2017 WL 34700, at \*17 n. 12 (M.D. Pa. Jan. 3, 2017).

<sup>61</sup> See Morris, *supra* note 55.

<sup>62</sup> *Abu-Jamal*, 2017 WL 34700, at \*3.

<sup>63</sup> *Id.*

<sup>64</sup> See #4 *New Era in Hepatitis C Treatment*, CLEVELAND CLINIC, <https://innovations.clevelandclinic.org/Programs/Top-10-Medical-Innovations/Top-10-for-2014/4-New-Era-in-Hepatitis-C-Treatment> [<https://perma.cc/7SCN-99KW>] (last visited Oct. 10, 2020).

<sup>65</sup> See *id.*

<sup>66</sup> Morris, *supra* note 55.

<sup>67</sup> *Abu-Jamal*, 2017 WL 34700, at \*3.

<sup>68</sup> Dan Margolies, *ACLU: Missouri Inmates Are Dying While Awaiting Hepatitis C Treatments*, KCUR 89.3 (June 18, 2019), <https://www.kcur.org/post/aclu-missouri-inmates-are-dying-while-awaiting-hepatitis-c-treatments#stream/0> [<https://perma.cc/KE8J-7ZLY>].

<sup>69</sup> *Id.*

## III. TREATMENT OF HEPATITIS C IN THE PRISON SYSTEM

Hepatitis C infection is a prevalent concern in any incarceration facility. Twenty percent of incarcerated individuals have hepatitis C, as opposed to one percent of the general population.<sup>70</sup> The number of infected prisoners is likely higher than twenty percent, but the true number is unknown because most prisons fail to screen all incoming individuals for HCV.<sup>71</sup> Treating prisoners with hepatitis C has been a longstanding issue in the prison system, especially because many prisoners meet many of the risk factors of hepatitis C and are not being properly screened before they enter the prison population.<sup>72</sup> HCV is transmitted through blood and bodily fluids and can be easily spread in prison because of the close quarters: sexual intercourse, illicit tattooing, sharing razors, and intravenous drug use are all common ways HCV can be transmitted.<sup>73</sup>

## A. Current Practices in the Prison System

Before discussing the treatment of hepatitis C within the prison system, one must have a working understanding of the prison healthcare system itself. Many states, especially those currently facing hepatitis C litigation, have privatized their prison healthcare system.<sup>74</sup> When a prison healthcare system is privatized, the state hires a company to provide healthcare, rather than hiring individual medical professionals.<sup>75</sup> Privatization

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<sup>70</sup> Weill-Greenberg, *supra* note 1.

<sup>71</sup> Anita Hassan, *Nevada Prisoners Denied Hepatitis C Treatment Sue the State*, NBC NEWS (Dec. 27, 2019), <https://www.nbcnews.com/news/us-news/nevada-prisoners-denied-hepatitis-c-treatment-sue-state-n1107381> [<https://perma.cc/JW96-J9B6>].

<sup>72</sup> Selina Ocal, Andrew J. Muir & Susanna Naggie, *Hepatitis C and Beyond Bars: Targeting the US Prison Population and Changing North Carolina Prisoner Health Policy*, 80 N.C. MED. J. 352, 352 (2019), <https://www.ncmedicaljournal.com/content/ncm/80/6/352.full.pdf> [<https://perma.cc/AH8X-B65K>].

<sup>73</sup> *Id.*

<sup>74</sup> Jordan Andrews, *The Current State of Public and Private Prison Healthcare*, WHARTON PUB. POL'Y INITIATIVE (Feb. 24, 2017), <https://publicpolicy.wharton.upenn.edu/live/news/1736-the-current-state-of-public-and-private-prison-for-students/blog/news.php> [<https://perma.cc/29WF-XJLK>].

<sup>75</sup> *Id.*

prevents states from having to provide benefits or pensions to state workers.<sup>76</sup>

Many of these healthcare companies, including the two largest, Corizon and Wexford, are under scrutiny by human rights groups and the court system alike for providing inadequate medical care to inmates.<sup>77</sup> As of 2019, Corizon held 31 contracts in 17 states<sup>78</sup> and had been a defendant in more than 1,000 healthcare lawsuits.<sup>79</sup> The suits involve a myriad of complaints including wrongful deaths, inadequate medical care, and failure to pay subcontractors.<sup>80</sup> Corizon has faced discipline even after reaching settlements with plaintiffs for failing to pay out the agreed sum.<sup>81</sup>

### 1. Screening

The CDC, the U.S. Preventative Services Task Force, and the World Health Organization recommend all inmates be screened for hepatitis C when they enter prison.<sup>82</sup> Unfortunately, most prisons only provide testing for hepatitis C if the inmate shows symptoms or asks to be tested.<sup>83</sup> In fact, the number of screened inmates is often abysmally low; in Georgia, only four percent of the prison population has been screened for hepatitis C.<sup>84</sup> Throughout all prison systems in the country, only sixteen percent

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<sup>76</sup> *Id.*

<sup>77</sup> *See id.*

<sup>78</sup> Elizabeth Weill-Greenberg, *Corizon, the Prison Healthcare Giant, Stumbles Again*, PRISON LEGAL NEWS (Feb. 8, 2019), <https://www.prisonlegalnews.org/news/2019/feb/8/corizon-prison-healthcare-giant-stumbles-again/> [https://perma.cc/94UJ-Q9HK].

<sup>79</sup> Steve Coll, *The Jail Health-Care Crisis*, NEW YORKER (Feb. 25, 2019), <https://www.newyorker.com/magazine/2019/03/04/the-jail-health-care-crisis> [https://perma.cc/XML8-T95G].

<sup>80</sup> *See id.*; see also Kristine Phillips, 'Something is Eating My Brain,' an Inmate Said. A Lawsuit Claims He Was Left to Die, THE WASHINGTON POST (Oct. 30, 2017), <https://www.washingtonpost.com/news/post-nation/wp/2017/10/27/something-is-eating-my-brain-an-inmate-said-a-lawsuit-says-he-was-left-to-die/> [https://perma.cc/DM3U-XTJB] (last visited Oct. 15, 2020); see also Weill-Greenberg, *supra* note 78.

<sup>81</sup> Weill-Greenberg, *supra* note 78.

<sup>82</sup> *HCV Testing and Treatment in Correctional Settings*, HCV GUIDELINES, <https://www.hcvguidelines.org/unique-populations/correctional> [https://perma.cc/5MNQ-CS2Y] (last visited Jan. 15, 2020).

<sup>83</sup> *See id.*

<sup>84</sup> Thanthong-Knight, *supra* note 54.

of facilities screened all inmates for HCV infection.<sup>85</sup> In 2016, the Federal Bureau of Prisons (“FBOP”) officially recommended opt-out testing for HCV infection.<sup>86</sup> A prison performing opt-out testing would screen every inmate entering its custody unless the inmate objected, similar to a patient receiving a blood pressure test at the doctor’s office.<sup>87</sup> While the FBOP guidelines recommend opt-out testing, they do not require it, meaning prisons are not compelled to follow the guidelines.<sup>88</sup> Therefore, prisons do not implement opt-out testing because of cost concerns,<sup>89</sup> and as a result miss a large number of infected individuals as they enter the prison system.

In reality, however, universal opt-out testing “is highly cost-effective and has been shown to reduce ongoing HCV transmission and the incidence of advanced liver disease.”<sup>90</sup> Allowing individuals with undetected hepatitis C to enter the prison system is dangerous to that individual’s health, as their hepatitis C is silently progressing, and the health of the entire prison population, which is now at risk of contracting the disease. Experts have predicted that universal opt-out testing would “enable diagnosis of 122,700 new HCV infections in prisons in the next 30 years; prevent 12,700 new HCV infections caused by release of infected inmates; and avert 11,700 liver-related deaths.”<sup>91</sup>

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<sup>85</sup> HCV GUIDELINES, *supra* note 82.

<sup>86</sup> *Id.*

<sup>87</sup> See *Evaluation and Management of Chronic Hepatitis C Virus (HCV) Infection*, FEDERAL BUREAU OF PRISONS 2 (Jan. 2018), [https://www.bop.gov/resources/pdfs/012018\\_hev\\_infection.pdf](https://www.bop.gov/resources/pdfs/012018_hev_infection.pdf) [<https://perma.cc/9UV5-AGC9>].

<sup>88</sup> *Id.*

<sup>89</sup> Tianhua He, et al., *Prevention of Hepatitis C by Screening and Treatment in U.S. Prisons*, 164 ANN. INTERN. MED. (2016), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4854298/pdf/nihms-780706.pdf> [<https://perma.cc/97QP-92KQ>] (“Three-quarters of the state prisons either offer no screening or targeted testing of inmates reporting high-risk behavior, which will miss many potential patients. According to a US [*sic*] Supreme Court ruling, prisons cannot have deliberate indifference to medical needs, if they are known. Therefore, once a diagnosis is made, a provider may find it difficult to justify not treating those diagnosed. Because treatment is expensive and prison budgets are often limited, there could be an incentive not to test for HCV.”).

<sup>90</sup> HCV GUIDELINES, *supra* note 82.

<sup>91</sup> *Id.* See also He, *supra* note 89.

On the occasion that an inmate is screened for hepatitis C, prisons frustrate the system further by not performing a complete test. Screening for hepatitis C occurs in two parts.<sup>92</sup> The first test only determines if an individual had HCV at one time; a second test, called a viral load test, is needed to determine whether the virus is still active.<sup>93</sup> For example, prisons in Missouri will perform the first test and not perform the second test, which requires no further sample collection, until years down the road.<sup>94</sup> As a result, some inmates could believe for years they are dying from hepatitis C, when in actuality they only had an acute infection, and their system has already rid itself of the virus.

## 2. Treatment

In the outside world, when an individual is diagnosed with hepatitis C, they are immediately placed on a course of DAAs, regardless of the presence of any symptoms or liver damage.<sup>95</sup> Since hepatitis C can progress silently for years, it is imperative that an individual receive treatment as soon as possible to prevent life-threatening complications.<sup>96</sup> When an inmate receives a hepatitis C diagnosis, some prisons merely “monitor” the inmate but will not administer DAA medication.<sup>97</sup> In a class-action suit against the Minnesota Department of Corrections, a judge found that the prison was not treating prisoners until they were suffering from liver damage.<sup>98</sup>

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<sup>92</sup> See *Hepatitis C Testing: What to Expect When Getting Tested*, CTR. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/hepatitis/hcv/HepatitisCTesting.htm> [<https://perma.cc/PSK5-QHS5>] (last updated June 26, 2020).

<sup>93</sup> *Id.*

<sup>94</sup> Notes on Preliminary Injunction Hearing, *supra* note 7.

<sup>95</sup> See *Early Detection, Early Treatment for Hepatitis C*, MICHIGAN HEALTH LAB (March 14, 2016, 3:00 PM), <https://labblog.uofmhealth.org/rounds/early-detection-early-treatment-for-hepatitis-c> [<https://perma.cc/28HN-LRUY>]; see also Notes on Preliminary Injunction Hearing, *supra* note 7. An expert witness testified that he would immediately begin DAA treatment for a patient with hepatitis C under his care. *Id.*

<sup>96</sup> MICHIGAN HEALTH LAB, *supra* note 95 (“But even the best treatments for HCV can reach their full potential only when initiated early in the course of the disease.”).

<sup>97</sup> See, e.g., Brandon Stahl, *Hepatitis C Settlement Guarantees ‘Cure to All Prisoners’ in Minnesota*, GOVERNING (March 19, 2019), <https://www.governing.com/topics/public-justice-safety/tns-minnesota-prison-hepatitis-c-drug.html> [<https://perma.cc/LE7Q-HQMV>].

<sup>98</sup> *Id.*

The number of inmates receiving DAA treatment is extremely low across the United States; the lack of treatment is not limited to one geographic area or healthcare provider. Before a court ordered the Florida Department of Corrections to administer DAAs to inmates, only thirteen inmates of 7,000 who met the criteria for treatment had been given DAAs.<sup>99</sup> As of June 2019, the Missouri Department of Corrections had only administered DAAs to fifteen inmates, compared to the 4,590 individuals incarcerated in Missouri who had been diagnosed with hepatitis C.<sup>100</sup> Some inmates who are named plaintiffs in the suit against Missouri Department of Corrections and Corizon Health were told after the suit was filed that they would receive treatment, but they are still waiting.<sup>101</sup> Pennsylvania treated slightly more inmates before litigation ensued with fifty individuals receiving DAA medication out of the over 5,000 with hepatitis C.<sup>102</sup>

Because Corizon Health is a defendant in numerous suits concerning hepatitis C treatment, some specific information is available about how inmates are “evaluated” and “monitored” while awaiting treatment. Corizon places inmates with hepatitis C in a spreadsheet, ranking them by their AST to Platelet Ratio Index, or APRI, scores.<sup>103</sup> An APRI score is a way to measure liver fibrosis in patients with hepatitis C by analyzing “the ratio of a particular enzyme to the number of platelets.”<sup>104</sup> Relying solely on

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<sup>99</sup> Mary Ellen Klas, *Florida Let Hepatitis C Go Untreated in Prisons. Now It May Cost Taxpayers Millions.*, TAMPA BAY TIMES (Nov. 20, 2017), <https://www.tampabay.com/florida-politics/buzz/2017/11/20/florida-let-hepatitis-c-go-untreated-in-prisons-now-it-may-cost-taxpayers-millions/> [https://perma.cc/3JLD-KUEX].

<sup>100</sup> Margolies, *supra* note 68.

<sup>101</sup> Notes on Preliminary Injunction Hearing, *supra* note 7. Donnie was told after the lawsuit had been filed that he was going to receive treatment, but as of his testimony in August 2019, he had not received DAA medication. *Id.* The Missouri Department of Corrections agreed to provide hepatitis C treatment to inmates in August 2020. *See Missouri Department of Corrections Required to Provide Lifesaving Hepatitis C Treatment to Thousands Behind Bars*, ACLU MISSOURI (Aug. 21, 2020), [https://www.aclu-mo.org/en/press-releases/missouri-department-corrections-required-provide-lifesaving-hepatitis-c-treatment?fbclid=IwAR0eue5Z2GwAXDasDeTzFIJNnSfacwQwu9m2LON\\_KECz9TNP9cEJjgSSSw0](https://www.aclu-mo.org/en/press-releases/missouri-department-corrections-required-provide-lifesaving-hepatitis-c-treatment?fbclid=IwAR0eue5Z2GwAXDasDeTzFIJNnSfacwQwu9m2LON_KECz9TNP9cEJjgSSSw0) [https://perma.cc/BGX6-PUFZ].

<sup>102</sup> *See Abu-Jamal v. Wetzel*, 3:16-CV-2000, 2017 WL 34700, at \*16 n. 11 (M.D. Pa. Jan. 3, 2017).

<sup>103</sup> Notes on Preliminary Injunction Hearing, *supra* note 7.

<sup>104</sup> *Postawko v. Missouri Dep't of Corr.*, 910 F.3d 1030, 1034 (8th Cir. 2018).

an APRI score, however, is not an accurate way to determine whether an individual has fibrosis or cirrhosis; over half of patients with cirrhosis will not have a high APRI score.<sup>105</sup> Other methods of detecting fibrosis or cirrhosis, such as a liver biopsy, are needed to establish a reliable conclusion about a patient's liver.<sup>106</sup> Despite this, Corizon implements a "cutoff" APRI score of 2.0; theoretically, prisoners are eligible to receive treatment once they reach an APRI of 2.0.<sup>107</sup> Prisoners who do not meet the "cutoff" APRI score of 2.0 are monitored by a blood test every six months.<sup>108</sup> However, even if an individual has an APRI score above 2.0, this does not mean a prisoner will receive DAA medication—they are merely "considered" for treatment.<sup>109</sup>

Prison healthcare providers use several factors to determine whether an individual with a qualifying APRI score is eligible to receive treatment. One of these factors is life expectancy; the standard of care in the medical community is to not provide hepatitis C treatment only if the patient is expected to live less than a year and DAA treatment would not alter the prognosis.<sup>110</sup>

The length of an inmate's sentence is also a factor; healthcare providers want to ensure that an individual will remain in custody long enough to complete a full course of treatment.<sup>111</sup> As mentioned previously, the time period required to complete treatment now is significantly shorter than it was a decade ago, only requiring twelve weeks to complete an entire course of treatment.<sup>112</sup>

Healthcare administrators will also deny treatment if they do not believe the prisoner can adhere to the medication.<sup>113</sup> This concern is almost unnecessary, however, as the DAAs are watch-take medications, which means a nurse must administer the

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<sup>105</sup> *Id.* at 1034-35.

<sup>106</sup> *Class Certification in Missouri Prisoners' Hepatitis C Suit Upheld*, PRISON LEGAL NEWS (Apr. 2, 2019), <https://www.prisonlegalnews.org/news/2019/apr/2/class-certification-missouri-prisoners-hepatitis-c-suit-upheld/> [https://perma.cc/MAU6-EGV3].

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*; see, e.g., *Postawko*, 910 F.3d at 1035.

<sup>109</sup> PRISON LEGAL NEWS, *supra* note 106.

<sup>110</sup> *Postawko*, 910 F.3d at 1034 n. 2.

<sup>111</sup> HCV GUIDELINES, *supra* note 82.

<sup>112</sup> See *id.*

<sup>113</sup> *Id.*

medication and watch the inmate take it.<sup>114</sup> Additionally, the inmates who are flagged for this non-adherence are often inmates who stopped using interferons because of the severe side effects, which are not a concern with the new medications.<sup>115</sup> Prison healthcare providers state that the main reason for not treating prisoners who have hepatitis C is purely the cost of DAAs, and the reason they consider factors like medication adherence and life expectancy when referring an individual for treatment, as they do not want to waste any courses of medication.<sup>116</sup>

Even if an individual meets all the criteria on paper to receive DAA medication, this does not guarantee medication will be administered. Private prison healthcare providers, including Corizon and Correct Care Solutions, have hepatitis C committees comprised of their employees.<sup>117</sup> If a healthcare provider believes one of their patients is eligible for DAA medication, he or she will submit a writeup to the hepatitis C committee.<sup>118</sup> The committee then decides whether an individual will ultimately begin treatment.<sup>119</sup> It is not entirely clear what the committees discuss, or the factors that ultimately go into deciding which prisoners will be cured.<sup>120</sup>

### *B. Prisoners' Fight for Assistance*

"I'm in a position where I can't help myself."<sup>121</sup>

When a prisoner has a claim relating to their incarceration, whether it be prison conditions, healthcare, discrimination, or any situation where they are requesting relief, they cannot immediately file a complaint and seek judicial relief. Because of the policies set forth in the Prison Litigation Reform Act ("PLRA"),

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<sup>114</sup> See *id.*

<sup>115</sup> See Bliss, *supra* note 15.

<sup>116</sup> See Notes on Preliminary Injunction Hearing, *supra* note 7.

<sup>117</sup> See, e.g., *Abu-Jamal*, 2017 WL 34700, at \*6; see also Notes on Preliminary Injunction Hearing, *supra* note 7.

<sup>118</sup> Notes on Preliminary Injunction Hearing, *supra* note 7.

<sup>119</sup> *Abu-Jamal*, 2017 WL 34700, at \*6 ("The individual's clinical status will be reviewed by the Hepatitis C Treatment Committee for prioritization for treatment with DAA medications."). See also *id.* at \*8 ("Dr. Noel testified that the Hepatitis C Treatment Committee has the ultimate authority to decide whether [an inmate] receives DAA medication.").

<sup>120</sup> Notes on Preliminary Injunction Hearing, *supra* note 7.

<sup>121</sup> *Thanthong-Knight*, *supra* note 54.

a prisoner must exhaust all administrative remedies in order for a court to have jurisdiction over the claim.<sup>122</sup> Exhaustion means that “a prisoner must complete the administrative review process in accordance with the applicable procedural rules, including deadlines, as a precondition to bringing suit in federal court.”<sup>123</sup>

Administrative remedies exist in the prison system in the form of grievances. A prisoner who has a complaint fills out a grievance form and submits it to the proper authority for review.<sup>124</sup> A grievance related to healthcare is usually reviewed by a healthcare provider, often a nurse.<sup>125</sup> The replies vary depending on the prison, but usually read similar to this response from a Corizon nurse in Arizona to an inmate with cirrhosis: “Your concern has been reviewed by medical and it was determined . . . you saw the medical provider who went over your current health status extensively. At this time you do not meet the necessary criteria to qualify for HEP C treatment while in ADOC.”<sup>126</sup> The response ends as almost all grievance replies do: “This has resolved your concern.”<sup>127</sup>

An inmate has the option to appeal the grievance but must do so within the specified time frame, or the matter is considered resolved.<sup>128</sup> Meeting that deadline is more complex than it sounds,

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<sup>122</sup> *Jobe v. State*, No. 2018-CP-00087-COA at 12 (Miss. Ct. App. 2019), <https://courts.ms.gov/Images/Opinions/CO137792.pdf> [<https://perma.cc/6BVJ-P8E5>] (Inmate had exhausted his administrative remedies in regards to his hepatitis C claim, but not other complaints, which were raised for the first time while seeking judicial relief.).

<sup>123</sup> *Wood v. Russell*, 255 F. Supp. 3d. 498, 507 (D. Del. 2017) (quoting *Woodford v. Ngo*, 548 U.S. 81, 88 (2006)).

<sup>124</sup> Paul Wright, *Prisoners and the Grievance System*, PRISON LEGAL NEWS (July 15, 1991), <https://www.prisonlegalnews.org/news/1991/jul/15/prisoners-and-the-grievance-system/> [<https://perma.cc/25YK-LBFX>].

<sup>125</sup> See, e.g., Elizabeth Whitman, *ADC, Corizon Ignored Policies in Denying Hep C Treatment to Wellington Coppess*, PHOENIX NEW TIMES (June 25, 2019, 8:34 AM), <https://www.phoenixnewtimes.com/news/corizon-adc-denied-hep-c-treatment-to-inmate-with-cirrhosis-11312874> [<https://perma.cc/4NVJ-AF7W>].

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> See Priyah Kaul et al., *Prison and Jail Grievance Policies: Lessons from a Fifty-State Survey*, MICHIGAN L. PRISON INFO. PROJECT (Oct. 18, 2015), <https://www.law.umich.edu/special/policyclearinghouse/Site%20Documents/FOIARepor%20t10.18.15.2.pdf> [<https://perma.cc/CL8A-VETF>]; The time frame prisoners have to appeal a grievance varies between states. The FBOP “requires appealing prisoners to

as inmates are completely reliant on prison staff for the materials required and the delivery of the appeal.<sup>129</sup> A Mississippi inmate waited eighty-six days for a reply from the Mississippi Department of Corrections in response to his request for DAA treatment.<sup>130</sup> The reply rejected his request, so he appealed one month later.<sup>131</sup> The response was later than he intended because it was during the holiday season and the Inmate Legal Assistance Program did not come to pick up the mail at the normal time.<sup>132</sup> The Mississippi Department of Corrections denied his appeal three days later, stating his appeal was untimely.<sup>133</sup> The inmate attempted to make the request again, but the Mississippi Department of Corrections stated: “this matter has already been accepted and closed [and] this particular request is being returned to you and will not be processed.”<sup>134</sup>

Ensuring all administrative remedies are exhausted is a time-consuming process, often bogged down even further by the bureaucracy of the prison grievance system. Hepatitis C patients do not have time to spare, so many inmates have friends and family on the outside campaigning to get them help.

One tireless advocate is the wife of a Missouri Department of Corrections (MDOC) inmate whose hepatitis C has progressed to late-stage liver cancer.<sup>135</sup> When she first learned of her husband’s hepatitis C diagnosis, before he developed cancer, she believed everything would be fine because of the new medication available

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submit the appropriate form within 30 days of the date the Regional Director signs the response.” *Id.* at 21.

<sup>129</sup> *Id.* at 13 (“Generally speaking, jurisdictions that require prisoners to request the forms disincentivize the filing of grievances by creating a gatekeeper.”).

<sup>130</sup> *Jobe v. State*, No. 2018-CP-00087-COA at 2 (Miss. Ct. App. 2019), <https://courts.ms.gov/Images/Opinions/CO137792.pdf> [<https://perma.cc/9ZH4-2LC3>].

<sup>131</sup> *Id.* at 2-3.

<sup>132</sup> *Id.* at 3. It should be noted that Mississippi prevents this issue from happening when an inmate is seeking judicial review of these administrative decisions through the use of the “prison mailbox rule.” *See Easley v. Roach*, 879 So. 2d 1041, 1042 (Miss. 2004). The rule states that “a pro se pleading is considered filed when mailed by the inmate and not when it is received by the circuit clerk.” *Id.* Perhaps these “timeliness” issues would subside within the prison grievance system if prisons had a similar policy. This would prevent manipulation of the grievance system by prison employees.

<sup>133</sup> *Jobe*, No. 2018-CP-00087-COA at 3.

<sup>134</sup> *Id.*

<sup>135</sup> Notes on Preliminary Injunction Hearing, *supra* note 7.

for hepatitis C.<sup>136</sup> She herself is a hepatitis C survivor; she contracted the disease in the 1980s from a blood transfusion.<sup>137</sup> She initially took interferons before DAAs were available, but her doctor discontinued the medication after she suffered an allergic reaction.<sup>138</sup> She began the DAA Harvoni in 2018 which successfully eradicated her hepatitis C.<sup>139</sup>

After discovering her husband would not be receiving DAA treatment, she contacted both the Missouri Department of Corrections, and the prison healthcare provider for Missouri, Corizon Health.<sup>140</sup> She has called several times a week for the last three years, but to no avail. She was told by a Corizon employee her husband's name was "on the list" to receive Harvoni beginning in September of 2018, but nothing ever came to fruition.<sup>141</sup> In addition to contacting the prison system, she reached out to other potential sources of help.<sup>142</sup> She called several advocacy groups, including a group called the CURE, who offered a highly discounted course of DAAs, but the Department of Corrections will not allow an outside entity to assist with medical procedures.<sup>143</sup> She also called her state representative, who showed no concern except as to how she had gotten his number.<sup>144</sup> Her husband will be up for parole in 2023, but doctors do not expect him to live to see that day.<sup>145</sup>

This feeling of helplessness affects not just the sick inmates, but their loved ones on the outside who are exhausting every resource to save the life of their suffering family member. Countless individuals like the woman above are met with roadblocks and frustration from every direction, and their cries for help are going unanswered.

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<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

## IV. LITIGATION RELATING TO HEPATITIS C TREATMENT IN PRISON

After exhausting all administrative remedies, prisoners can file a complaint in federal court to seek judicial relief.<sup>146</sup> Most of these complaints are entered pro se, meaning the inmate is acting as his own legal counsel.<sup>147</sup> Unfortunately, these cases face many obstacles because of the limited resources and knowledge available to inmates. Many of these hepatitis C complaints are picked up by civil rights groups and private firms acting pro bono, providing much-needed legal assistance.<sup>148</sup> These organizations combine individual complaints into one large lawsuit.<sup>149</sup> The inmates involved directly with the suit are named plaintiffs.<sup>150</sup> However, to ensure that all affected prisoners receive relief, counsel will request class certification.<sup>151</sup>

The Eighth Circuit Court of Appeals upheld class certification in a lawsuit against the Missouri Department of Corrections and Corizon Health for failing to provide adequate treatment to prisoners with hepatitis C.<sup>152</sup> The district court initially certified the class, but the state of Missouri appealed, claiming the plaintiffs had failed to meet the requirements to be considered a class.<sup>153</sup> The court found that the class of affected prisoners numbered at least 2,000, which met the numerosity requirement for class-actions, and that the “claims of the class members were both common and typical.”<sup>154</sup> Therefore, the Eighth Circuit upheld “[t]he certification of a class of Missouri prisoners who have been diagnosed with chronic HCV but denied DAA treatment by the MDOC. . . .”<sup>155</sup> The affirmation of class-action by the Eighth Circuit undoubtedly supports other district courts’ decisions to grant class-action status to similarly situated

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<sup>146</sup> See Wright, *supra* note 124.

<sup>147</sup> See Coll, *supra* note 79.

<sup>148</sup> See, e.g., Postawko v. Missouri Dep’t of Corr., 910 F.3d 1030 (8th Cir. 2018) (law firm providing pro bono legal services); see also Bliss, *supra* note 47.

<sup>149</sup> PRISON LEGAL NEWS, *supra* note 106.

<sup>150</sup> See, e.g., Postawko, 910 F.3d at 1030.

<sup>151</sup> See PRISON LEGAL NEWS, *supra* note 106.

<sup>152</sup> *Id.*

<sup>153</sup> Postawko, 910 F.3d at 1035-36.

<sup>154</sup> PRISON LEGAL NEWS, *supra* note 106.

<sup>155</sup> *Id.*

prisoners, and hopefully has set a precedent that will discourage states from challenging the class certification, which would only serve to further prolong litigation.

### A. *The Evolution of Prison Healthcare Litigation*

Prisoner lawsuits based on lack of healthcare are not a new or novel development, and hepatitis C is not the only medical condition that is poorly treated or completely ignored by the providers of prison healthcare. The following developments in jurisprudence created the litigation landscape of prisoner healthcare claims that exists today.

In 1976, the United States Supreme Court established in *Estelle v. Gamble* that inmates have a constitutional right to medical care.<sup>156</sup> This case arose out of a prisoner complaint that the prison's failure to treat his back injury violated the Eighth Amendment prohibition on cruel and unusual punishment.<sup>157</sup> The complaint was dismissed by the district court for failure to state a claim upon which relief could be granted, and the Fifth Circuit reinstated the complaint.<sup>158</sup> The Supreme Court held that "deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain' . . . proscribed by the Eighth Amendment."<sup>159</sup> This deliberate indifference can either be "manifested by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed."<sup>160</sup>

*Estelle* set the precedent for dealing with prison healthcare claims, but in the years following the decision, lower courts could not agree on what constituted "deliberate indifference" by a prison official.<sup>161</sup> The Supreme Court elaborated on the "deliberate indifference" test in *Farmer v. Brennan*.<sup>162</sup> The plaintiff in *Farmer*

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<sup>156</sup> *Estelle v. Gamble*, 429 U.S. 97, 103 (1976).

<sup>157</sup> *Id.* at 99, 102.

<sup>158</sup> *Id.* at 98.

<sup>159</sup> *Id.* at 104 (quoting *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (joint opinion)).

<sup>160</sup> *Id.* at 104-105.

<sup>161</sup> *Farmer v. Brennan*, 511 U.S. 825, 832 (1994) ("We granted certiorari . . . because Courts of Appeals had adopted inconsistent tests for 'deliberate indifference.'").

<sup>162</sup> *Id.* at 832-848.

was a transgender inmate who had been beaten and raped by another prisoner after being transferred to a higher security facility.<sup>163</sup> The plaintiff requested the Court adopt an objective test to establish deliberate indifference by a prison official, which the Court declined to do.<sup>164</sup> The Supreme Court explained that the deliberate indifference standard is “more than mere negligence,” but is “satisfied by something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result.”<sup>165</sup>

The Court ultimately held that a prison official can only be held liable under the Eighth Amendment if “the official knows of and disregards an excessive risk to inmate health or safety.”<sup>166</sup> This means that an “official must both be aware of facts from which the inference could be drawn that a substantial risk of harm exists, and he must also draw the inference.”<sup>167</sup> Under this standard, an individual bringing an Eighth Amendment claim does not need to “show that a prison official acted or failed to act believing that harm would actually befall an inmate.”<sup>168</sup> Rather, “it is enough that the official acted or failed to act despite his knowledge of a substantial risk of serious harm.”<sup>169</sup>

Much prison litigation involves 42 U.S.C. § 1983, which provides for civil action for the deprivation of rights. The relevant portion of the statute reads:

Every person who . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer’s judicial capacity,

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<sup>163</sup> *Id.* at 829-30.

<sup>164</sup> *Id.* at 835, 837.

<sup>165</sup> *Id.* at 835.

<sup>166</sup> *Id.* at 837.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 842.

<sup>169</sup> *Id.*

injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.<sup>170</sup>

While the statute makes clear that one who violates another's constitutional rights is liable to the other party, it also raises the issue of qualified immunity, adding another layer to the already complicated area of prison healthcare litigation. Most state officials, when faced with a § 1983 claim, are entitled to raise qualified immunity as an affirmative defense.<sup>171</sup> Qualified immunity shields a state official from liability or damages caused by a violation of a plaintiff's clearly established constitutional right when a suit is brought against an official in his or her individual capacity.<sup>172</sup> The existence of qualified immunity protects state officials "from being sued for every error in judgment, thereby diverting their attention from their public duties, preventing them from independently exercising their discretion because of the fear of damages liability . . . ."<sup>173</sup>

Qualified immunity is usually not available when the relief sought is declaratory or injunctive.<sup>174</sup> This is because "such suits are not as likely to chill the defendant's independent exercise of discretion and because of the need to provide some mechanism for the federal courts to prevent violations of constitutional rights by state officials."<sup>175</sup> Therefore, qualified immunity is possibly available in the prison healthcare context when a prison official is sued in his or her individual capacity for damages arising out of an alleged violation of a constitutional right. Specifically in hepatitis C litigation, the relief sought is often a preliminary injunction requiring officials to treat all affected inmates with

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<sup>170</sup> 42 U.S.C. § 1983 (2020).

<sup>171</sup> Kit Kinports, *Qualified Immunity in Section 1983 Cases: The Unanswered Questions*, 23 GA. L. REV. 597, 600 (1989).

<sup>172</sup> *Id.* at 600-01. *See also* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (declaring government officials protected from liability as long as their conduct does not violate a "clearly established statutory or constitutional right[ ] of which a reasonable person would have known").

<sup>173</sup> Kinports, *supra* note 171, at 601.

<sup>174</sup> *Id.* at 600 n.13.

<sup>175</sup> *Id.* *See also* Pulliam v. Allen, 466 U.S. 522, 528-43 (1984).

DAAAs.<sup>176</sup> Qualified immunity might be more likely to come into play in a wrongful death suit where damages are sought, possibly brought by family members of a prisoner who has died due to alleged “deliberate indifference” by healthcare staff.<sup>177</sup>

### *B. Hepatitis C Litigation: Pre-DAAAs*

When only interferons were available to treat hepatitis C, there was less litigation surrounding the issue, and inmates were not winning their cases whether they were seeking damages or injunctions. For example, a Third Circuit case from 2004 denied an inmate’s claim of a prison’s deliberate indifference toward his hepatitis C.<sup>178</sup> The inmate was denied interferon treatment because the prison physicians believed “his condition had not yet progressed to the point where such treatment would have been appropriate.”<sup>179</sup> The inmate’s hepatitis C was being monitored by prison staff, and he was receiving pain medication and vitamin supplements.<sup>180</sup> The court held that because the inmate’s condition had not progressed to a more severe level, the specific treatment the inmate was requesting was not required under the Eighth Amendment.<sup>181</sup> Additionally, his sentence length may not have been long enough to allow for a full course of interferon treatment.<sup>182</sup> Presumably, since hepatitis C did not have an extremely effective cure even outside prison, courts did not see an Eighth Amendment violation for failing to administer rigorous or novel treatment to inmates.

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<sup>176</sup> See, e.g., *Postawko v. Missouri Dep’t of Corr.*, 910 F.3d 1030, 1036 (8th Cir. 2018) (seeking preliminary injunction to treat all inmates within the Missouri Department of Corrections suffering from hepatitis C).

<sup>177</sup> See, e.g., *Bays v. Montmorency Cty.*, 874 F.3d 264, 268-271 (6th Cir. 2017) (granting qualified immunity to jail but denying it for nurse with subjective knowledge of inmate’s serious mental illness in wrongful death suit brought by parents of inmate who died by suicide).

<sup>178</sup> *Iseley v. Dragovich*, 90 F. App’x 577, 582 (3d Cir. 2004).

<sup>179</sup> *Id.* at 581.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* at 580-81.

<sup>182</sup> *Id.* at 581.

*C. Changes in Litigation Landscape Due to Introduction of DAA Medications*

Now that there exists an effective cure for hepatitis C, lawsuits against prisons have been more prevalent, and more successful, than in the past. Claims are brought under the theories of *Estelle*, *Farmer*, and § 1983, as discussed above.<sup>183</sup> Most suits argue that ignoring prisoners with hepatitis C constitutes deliberate indifference.<sup>184</sup> The deliberate indifference standard has two prongs: one, the inmate must be suffering from an objectively serious medical need, and two, the prison officials must be aware of the need and subjectively choose not to provide care.<sup>185</sup> A medical need is qualified as “objectively serious” when it has been diagnosed by a physician or is “so obvious that even a layperson would easily recognize the necessity for a doctor’s attention.”<sup>186</sup> Many courts have found that hepatitis C is an objectively serious medical need,<sup>187</sup> and now that a cure is readily available, choosing not to provide that care has resulted in successful deliberate indifference claims.<sup>188</sup>

Suits against departments of corrections and private healthcare providers have increased rapidly throughout the United States in the past several years. District courts, recognizing that the standard of care regarding hepatitis C has changed, have declared that prisoners are entitled to that standard of care.<sup>189</sup> Some courts have based their decision on the gravity of harm facing prisoners who go without treatment. For example, the United States District Court for the Northern District of Florida granted a preliminary injunction to state inmates in a class-action suit in Florida.<sup>190</sup> The court held that the potential injury to inmates outweighed any hardship to the Florida Department of Corrections (“FDC”) and that the FDC was

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<sup>183</sup> See discussion *supra* Part IV.A.

<sup>184</sup> See, e.g., *Bliss*, *supra* note 47.

<sup>185</sup> *Farmer v. Brennan*, 511 U.S. 825, 834 (1994).

<sup>186</sup> *Barton v. Taber*, 820 F.3d 958, 964 (8th Cir. 2016) (citations omitted).

<sup>187</sup> See, e.g., *Abu-Jamal v. Wetzel*, 3:16-CV-2000, 2017 WL 34700, at \*11 (M.D. Pa. Jan. 3, 2017).

<sup>188</sup> See *id.*; see also *Hoffer v. Jones*, 290 F. Supp. 3d 1292, 1303-4 (N.D. Fla. 2017).

<sup>189</sup> See, e.g., *Abu-Jamal*, 2017 WL 34700, at \*11.

<sup>190</sup> *Hoffer*, 290 F. Supp. 3d at 1294.

deliberately indifferent to the inmates' serious medical needs.<sup>191</sup> The court found that "[t]he only harm facing FDC is that it will have to spend more money than it wants to."<sup>192</sup>

District courts are also evaluating prisons' protocols for treating hepatitis C and striking the protocols down as a violation of the Eighth Amendment and a direct cause of needless deaths. For example, the United States District Court for the Middle District of Pennsylvania has found that the Department of Corrections' current protocol delayed treatment until a "gastroenterologist determines, at the end of a lengthy, multi-step evaluation procedure taking place over a long period of time, that [the] inmate has esophageal varices."<sup>193</sup> Esophageal varices are abnormal enlarged veins in the esophagus and a sign of late-stage hepatitis C,<sup>194</sup> meaning that the Pennsylvania Department of Corrections was denying treatment until it was confirmed a prisoner's hepatitis C was extremely advanced. In a separate case, the Middle District of Pennsylvania noted that:

[T]he effect of the protocol is to delay administration of DAA medications until the inmate faces the imminent prospect of "catastrophic" rupture and bleeding out of the esophageal vessels. Additionally, by denying treatment until inmates have "advanced disease" . . . the interim protocol prolongs the suffering of those who have been diagnosed with chronic Hepatitis C and allows the progression of the disease to accelerate so that it presents a greater threat of cirrhosis, hepatocellular carcinoma, and death of the inmate with such disease.<sup>195</sup>

A delay of this nature, when prompt treatment is imperative, is clearly a violation of the Eighth Amendment. While this ruling sets strong precedent for eradicating other egregious hepatitis C

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<sup>191</sup> *Id.* at 1304.

<sup>192</sup> *Id.*

<sup>193</sup> *Abu-Jamal*, 2017 WL 34700, at \*14.

<sup>194</sup> Simon, *supra* note 42.

<sup>195</sup> *Abu-Jamal*, 2017 WL 34700, at \*15 (quoting *Abu-Jamal v. Kerestes*, No. 3:15-CV-00967, 2016 WL 4574646 at \*13 (M.D. Pa. Aug. 31, 2016)). The Pennsylvania Department of Corrections was attempting to argue here that their interim protocol, at issue in the 2016 case, differed from the protocol that existed in the 2017 case. *Id.* The court disagreed, finding the same issues still existed in the current protocol, and quoted its opinion to reiterate its point from the previous case. *Id.* at \*15-17.

protocols, district courts should go one step further and declare that all inmates with hepatitis C need prompt treatment. Policies that only prioritize treatment for individuals with the most advanced hepatitis C are unconstitutional. Hepatitis C requires treatment regardless of the stage of the disease, especially because liver damage and life-threatening complications can progress rapidly with no outward symptoms.<sup>196</sup>

An opportunity to be heard by the court is a positive step in the journey for affected prisoners and their legal advocates, but trials and hearings are lengthy processes and do not guarantee relief after the process is complete. A judge may find that administering DAAs to all qualifying inmates is too burdensome on the prison system, or that the harm facing these inmates is not imminent or severe enough to warrant a preliminary injunction. Perhaps the greatest risk, though, is not of an unfavorable opinion, but the time it takes to obtain relief once it is granted.

The plaintiff inmates in hepatitis C lawsuits likely have been seeking relief for years before their plea is heard in court. As they wait for their court date or for a judge to write an opinion, their condition is deteriorating rapidly. Inmates are dying before relief is granted.<sup>197</sup> An Arizona inmate wrote “Notice I am being killed,” in a court document filed in a federal lawsuit demanding improved healthcare services in Arizona prisons.<sup>198</sup> He died six weeks later from hepatitis C complications.<sup>199</sup> Even if a favorable opinion is eventually written, the process of seeking judicial relief is not the most effective method for saving the lives of inmates who are facing imminent death. The MacArthur Justice Center in

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<sup>196</sup> Heather Gray, *5 Reasons Not to Delay Your Hep C Treatment*, HEALTHLINE, [https://www.healthline.com/health/hepatitis-c/why-early-treatment?utm\\_source=native&utm\\_medium=ndt&utm\\_campaign=EpclusaNative#getting-cured](https://www.healthline.com/health/hepatitis-c/why-early-treatment?utm_source=native&utm_medium=ndt&utm_campaign=EpclusaNative#getting-cured) [<https://perma.cc/B69K-6PVX>] (last updated Jan. 2, 2020).

<sup>197</sup> Steven Hsieh, *Arizona Prisoner Dies After Writing ‘I Am Being Killed’ in Court Document*, PHOENIX NEW TIMES (Feb. 7, 2019, 12:12 PM), <https://www.phoenixnewtimes.com/news/arizona-prisoner-dies-after-writing-being-killed-in-court-document-11200551> [<https://perma.cc/TQJ6-3J93>]; see also Alex Smith, *Missouri Faces Costly Dilemma: How To Treat Inmates With Hepatitis C?*, NAT’L PUB. RADIO (Jan. 19, 2018, 12:04 PM), <https://www.npr.org/sections/health-shots/2018/01/19/578425032/missouri-faces-costly-dilemma-how-to-treat-inmates-with-hepatitis-c> [<https://perma.cc/MER7-Y9YS>]; see also Margolies, *supra* note 68.

<sup>198</sup> Hsieh, *supra* note 197.

<sup>199</sup> *Id.*

Missouri, which is currently engaged in hepatitis C litigation, has recognized this problem and requested relief.<sup>200</sup> Director Amy Breihan explained, “[w]hat we’re asking for is . . . to provide emergency relief to provide treatment to some of the class members while the litigation proceeds, because there is a threat of irreparable harm to these folks if you don’t provide treatment now.”<sup>201</sup> Because of the slow nature of litigation, some form of relief is necessary to prevent deaths in the interim.

Despite the promising trend throughout the courts, not all judges have been convinced that prisons are violating the Eighth Amendment. A federal district judge in Tennessee ruled that the Tennessee Department of Corrections’ hepatitis C policies did not infringe on prisoners’ constitutional rights.<sup>202</sup> The judge stated that the policies themselves and their application were “not perfect, but Plaintiffs [had] failed to prove” their rights were violated.<sup>203</sup> This ruling was made despite a 2016 finding that only eight of the 3,487 known hepatitis C cases had been treated, and that the medical community recommends treatment for all individuals with hepatitis C, regardless of the current progression of the disease.<sup>204</sup> The judge did note that “[t]here is room for much continued improvement in TDOC’s treatment of HCV inmates with DAAs . . . [t]ime will tell whether TDOC implements the 2019 HCV Guidance in the dedicated manner it has represented and continues to accelerate the approval of inmates for treatment with DAAs.”<sup>205</sup> The judge further added that “treatment that is not grossly inadequate today be subject to that renewed claim in the future.”<sup>206</sup> While the ruling in favor of the department of corrections is discouraging, the judge based his decision on the

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<sup>200</sup> Jaclyn Driscoll, *Prison Inmates Want Treatment for Hepatitis C While Waiting for Lawsuit to be Heard*, ST. LOUIS PUB. RADIO (Aug. 14, 2019, 10 :28 PM), <https://news.stlpublicradio.org/post/prison-inmates-want-treatment-hepatitis-c-while-waiting-lawsuit-be-heard#stream/0> [<https://perma.cc/BH3Q-VAL9>].

<sup>201</sup> *Id.*

<sup>202</sup> Mariah Timms, *Judge Rules Against Inmates in Hepatitis C Lawsuit, Says State Policies Don’t Violate Rights*, TENNESSEAN (Oct. 1, 2019), <https://www.tennessean.com/story/news/local/2019/10/01/hepatitis-c-hev-tennessee-prisons-federal-court-ruling/3826018002/> [<https://perma.cc/5R72-4FA5>].

<sup>203</sup> *Atkins v. Parker*, 412 F. Supp. 3d 761, 765 (M.D. Tenn. 2019); *see also id.*

<sup>204</sup> Timms, *supra* note 202.

<sup>205</sup> *Atkins*, 412 F. Supp. 3d at 786.

<sup>206</sup> *Id.*

assumption that the prison will exercise its guidelines and perform treatment as presented in court.<sup>207</sup> If no change occurs, and inmates are still treated with DAAs at an abysmally slow pace, this ruling suggests that the issue should be reconsidered.

The cases discussed are illustrative of the conversation happening around the country. Most states have seen litigation regarding hepatitis C in prisons, and the majority of litigation has been successful, declaring that refusing inmates the treatment they need is unconstitutional.<sup>208</sup> Despite the trend throughout the United States, departments of corrections and private healthcare providers continue to fight progress, delaying treatment and claiming the funds for DAAs do not exist.

### 1. The Cost Concern

Prisons and their healthcare providers claim their sole reason for not administering the cure to their inmates with hepatitis C is the cost of DAA drugs.<sup>209</sup> Two Corizon health doctors even testified under oath that “if they could, they would treat everybody . . . who has chronic hepatitis C with these direct acting antiviral drugs.”<sup>210</sup> When Sovaldi, the first DAA, was introduced in 2013, a full course of treatment cost \$84,000.<sup>211</sup> With more drugs on the market, and deals offered to states by drug officials, full treatment courses are available to inmates for around \$20,000.<sup>212</sup> Additionally, some experts have suggested using nominal pricing, which is a pricing mechanism that provides discounts that, by law, must be less than 10% of its average market price, to “safety-net” facilities.<sup>213</sup> If nominal pricing is extended to correctional facilities, the cost to administer the cure to inmates would be cut dramatically.<sup>214</sup> Some states have proven

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<sup>207</sup> *Id.*

<sup>208</sup> See discussion *supra* Part IV.C.

<sup>209</sup> Smith, *supra* note 197.

<sup>210</sup> Driscoll, *supra* note 200.

<sup>211</sup> Smith, *supra* note 197.

<sup>212</sup> Margolies, *supra* note 68.

<sup>213</sup> Anne C. Spaulding & Jagpreet Chhatwal, ‘Nominal Pricing’ Can Help Prisons and Jails Treat Hepatitis C Without Breaking the Bank, STAT NEWS (Jan. 9, 2019), <https://www.statnews.com/2019/01/09/nominal-pricing-prisons-jails-treat-hepatitis-c/> [<https://perma.cc/DF68-6LHP>].

<sup>214</sup> *Id.*

that it is possible to allocate the necessary funds to treat inmates. Louisiana recently entered into an agreement with a drug provider where the state would pay a flat fee for “unlimited hepatitis C medication” for the next five years.<sup>215</sup> This will make DAA medication available to “all patients, including prisoners.”<sup>216</sup> After a lawsuit was filed, California set aside \$106 million to treat its approximately 22,000 inmates infected with HCV.<sup>217</sup>

Although the administration of DAAs is a true budgetary concern, these departments likely end up spending much more money in litigation costs defending these lawsuits than they would if they simply treated all inmates diagnosed with hepatitis C. Not only are the departments facing the cost of litigation itself, but the plaintiffs are often successful, and the defendant prisons are ordered to administer DAAs to their inmates.<sup>218</sup> The prisons have created their own cost predicament by choosing to stack litigation costs on top of the cost of administering treatment to those in its care.

The decision to ignore the hepatitis C crisis within United States prisons is costing taxpayers money. Prison healthcare providers refuse to spend any money toward opt-out screening of individuals as they enter prisons, allowing the hepatitis C epidemic to rage on, rather than providing preventative screening that would ultimately save money.<sup>219</sup> If less individuals enter prisons with undetected hepatitis C, the less the disease would spread, and the less money would need to go toward treatment. Instead, the prisons are allowing costs to multiply as inmates get sicker and more advanced treatment is needed for severe hepatitis C complications. Mark Roberts, Chairman of the University of Pittsburgh Department of Health Policy and Management, explained that DAAs, while expensive, are still cost-effective.<sup>220</sup> He stated that “something that is really expensive can still be

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<sup>215</sup> Hassan, *supra* note 71.

<sup>216</sup> *Id.*

<sup>217</sup> Margolies, *supra* note 68.

<sup>218</sup> See discussion *supra* Part IV.C.

<sup>219</sup> Smith, *supra* note 197.

<sup>220</sup> Michael Ollove, *Courts Force States to Provide Costly Hep C Treatment*, THE PEW CHARITABLE TRUSTS (Sept. 25, 2018), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/09/25/courts-force-states-to-provide-costly-hep-c-treatment> [https://perma.cc/U227-STD8].

cost-effective if it is really, really effective . . . [a]nd these drugs are very, very effective.”<sup>221</sup> Prisons’ concerns about cost seem to be short-sighted in light of the money that will be saved if prisoners are treated with DAAs now.

#### V. PRISONERS WITH HEPATITIS C SHOULD RECEIVE DAA MEDICATION

The cost of prisons’ negligence is a concern for each state and its citizens, but the true harm reaches far beyond any monetary detriment. The prisoners face harm to their health and to their dignity as human beings. This continuing disregard for the dignity of prisoners costs society its dignity and adds a practical public health concern to the communities of released prisoners who have not been treated while in custody.

##### *A. Inherent Human Dignity Requires Prisoners Receive Basic Healthcare*

Society has adopted a troubling mindset when it comes to our incarcerated population. Rather than viewing prisons as a place of rehabilitation, where individuals can serve their time and prepare to re-enter society, prisons are now considered a place where we house the irredeemable, inhuman, undignified members of our society. We are more focused on revenge and keeping these people ostracized from our communities rather than helping them improve and become contributing members of our society. Regardless if an individual’s actions have warranted punishment in the form of incarceration, inmates are “not . . . some lower form of life that merely needs to keep drawing breath . . . but . . . fellow human beings whose suffering and despair demand a moral response.”<sup>222</sup>

Preventable suffering from hepatitis C surely, too, demands a moral response. As stated by Missouri’s MacArthur Justice Center Director Amy Breihan, prisons’ attitude toward hepatitis C treatment “display[s a] gross lack of respect for human life and

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<sup>221</sup> *Id.*

<sup>222</sup> THE EIGHTH AMENDMENT AND ITS FUTURE IN A NEW AGE OF PUNISHMENT 140 (Meghan J. Ryan & William W. Berry III, eds., 2020).

dignity of the people in its care.”<sup>223</sup> Creating an entirely new, unjustified punishment, not decided by any judge or jury, refuses to respect the inherent dignity of human life. The decisions regarding who receives treatment and who does not is completely arbitrary and does not recognize the value of each individual. The ACLU of Connecticut’s Legal Director, Dan Barret, explained this sentencing disparity, stating, “No one sentenced people in prison to die from lack of medical care . . . [n]o gavel banged and said, ‘I sentence you to a hole in which your medical needs are going to be ignored.’”<sup>224</sup>

A Virginia inmate in 2018 plead, “I don’t have a life sentence. I got people that I care about and I want to fix things. I want to live. I wasn’t sentenced to death. Don’t let me die in here.”<sup>225</sup> Death, when one’s punishment is not execution, is more than unconstitutional, but offends the very nature of human dignity. It destroys any and all chance at redemption, or the possibility to live in a way that contributes positively to society. Similarly, pain and suffering, which serves no penological purpose, “is inconsistent with contemporary standards of decency,” and does not match the evolving standards society should be moving toward.<sup>226</sup> Each prisoner suffering from hepatitis C has lost more than their autonomy or freedom from incarceration; their sentence has cost them their inherent human dignity and chance at redemption.

### *B. Prisoners Have a Constitutional Right to Basic Healthcare*

Incarceration does not strip inmates of the rights to which they are entitled as American citizens, or as individuals residing in the United States. “[T]here is not an ‘iron curtain’ cutting inmates off from all constitutional rights.”<sup>227</sup> The Eighth

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<sup>223</sup> *Eighth Circuit Affirms Class-Action Status for Lawsuit Against Missouri Department of Corrections’ for Lack of Hepatitis C Treatment*, MACARTHUR JUSTICE CENTER (Dec. 7, 2018), <https://www.macarthurjustice.org/eighth-circuit-affirms-class-action-status-for-lawsuit-against-missouri-department-of-corrections-for-lack-of-hepatitis-c-treatment/> [https://perma.cc/GS9Y-QXY9].

<sup>224</sup> Weill-Greenberg, *supra* note 1.

<sup>225</sup> Thanthong-Knight, *supra* note 54.

<sup>226</sup> *Estelle v. Gamble*, 429 U.S. 97, 103 (1976).

<sup>227</sup> Brittany Bondurant, *The Privatization of Prisons and Prisoner Healthcare: Addressing the Extent of Prisoners’ Right to Healthcare*, 39 NEW. ENG. J. ON CRIM. &

Amendment prohibits cruel and unusual punishment and is applicable to the states through the Fourteenth Amendment.<sup>228</sup> *Estelle v. Gamble*<sup>229</sup> and *Farmer v. Brennan*<sup>230</sup> interpreted the Eighth Amendment to apply to prison conditions and the treatment of illness and injury within the prison system.<sup>231</sup> Prison conditions are subject to the Eighth Amendment, which does not permit “inhumane” conditions.<sup>232</sup> The Eighth Amendment also “imposes on prison officials an affirmative duty to ensure in an ongoing way the health and safety of incarcerated persons.”<sup>233</sup> This affirmative duty undoubtedly extends to the treatment of inmates suffering from hepatitis C.<sup>234</sup> Preventing a needless death from a curable disease fulfills the bare minimum of this duty to ensure prisoners’ health.

The Eighth Amendment embodies “broad and idealistic concepts of dignity, civilized standards, humanity and decency.”<sup>235</sup> If we treat prisoners as deserving less than dignity, we run the risk of undermining the basic concept of the Eighth Amendment itself, which the Supreme Court has declared is “nothing less than the dignity of man.”<sup>236</sup>

### *C. Prisons Have an Affirmative Duty to Provide for the Basic Needs of Those in Custody*

While incarcerated, inmates rely solely on prison officials for food, protection, clothing, and every other basic need. This complete reliance creates a duty for the State, and consequently, prison officials, to provide for the basic needs of those

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CIV. CONFINEMENT 407, 413 (2013). *See also* *Wolff v. McDonnell*, 418 U.S. 539, 555-56 (1974).

<sup>228</sup> U.S. CONST. amend. VIII; *Estelle*, 429 U.S. at 101-02.

<sup>229</sup> 429 U.S. at 97.

<sup>230</sup> 511 U.S. 825 (1994).

<sup>231</sup> *See* discussion *supra* Part IV.A.

<sup>232</sup> *Farmer*, 511 U.S. at 832.

<sup>233</sup> Ryan & Berry, *supra* note 222, at 139-40.

<sup>234</sup> *Thanthong-Knight*, *supra* note 54 (stating “[o]nce you’ve incarcerated people, you have to take care of them,” regarding the failure to treat prisoners with hepatitis C).

<sup>235</sup> Ryan & Berry, *supra* note 222, at 140.

<sup>236</sup> *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (plurality opinion) (holding that statute authorizing expatriation of a person who is convicted by military court martial of desertion from the United States Army is beyond the war powers of Congress and a violation of the Eighth Amendment).

incarcerated. This duty on prison officials is not simply a suggestion or theory from prisoners' rights activists. The Eighth Amendment itself imposes a duty on prison officials to provide for the basic needs of inmates. Stated explicitly by Chief Justice Rehnquist, "when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being."<sup>237</sup>

Lower courts first established that prisons had an affirmative duty to protect those in its custody "from violence at the hands of other prisoners."<sup>238</sup> Protection from other inmates, as a condition of confinement, was deemed subject to Eighth Amendment scrutiny.<sup>239</sup> The Supreme Court later declared that the Eighth Amendment "also imposes duties on [prison] officials, who must provide humane conditions of confinement."<sup>240</sup> These duties including ensuring "that inmates receive adequate food, clothing, shelter, and medical care."<sup>241</sup>

Inmates are completely reliant on the prison for medical treatment. As noted by Supreme Court Justice Thurgood Marshall, "[a]n inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met."<sup>242</sup> Incarceration places individuals in an extremely vulnerable position, and it is the duty of the prison to provide for those in its custody. Because the state has made the decision "to incarcerate people convicted of crimes," it has "commit[ted] itself to providing for their basic needs as long as they are in custody."<sup>243</sup> When a system limits individuals' ability to care for themselves through imprisonment, it takes on the responsibility

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<sup>237</sup> *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 199-200 (1989) (declaring that a state has no constitutional duty to protect a child from parent upon reports of abuse).

<sup>238</sup> *Farmer v. Brennan*, 511 U.S. 825, 833 (1994) (quoting *Cortes-Quinones v. Jimenez-Nettleship*, 842 F.2d 556, 558 (1st Cir. 1988)).

<sup>239</sup> *Wilson v. Seiter*, 501 U.S. 294, 303 (1991) (holding that prisoners claiming that their conditions of confinement constituted cruel and unusual punishment in violation of the Eighth Amendment are required to show prison officials exhibited deliberate indifference).

<sup>240</sup> *Farmer*, 511 U.S. at 832.

<sup>241</sup> *Id.*

<sup>242</sup> *Estelle v. Gamble*, 429 U.S. 97, 103 (1976).

<sup>243</sup> *Ryan & Berry*, *supra* note 222, at 139.

to provide care.<sup>244</sup> *Estelle* interpreted the Eighth Amendment “to impose a duty on the government to provide a minimal standard of medical care.”<sup>245</sup> Inmates suffering from hepatitis C are completely at the mercy of prison officials, who ultimately get to decide whose life to gamble when they arbitrarily pick and choose who receives treatment. This approach to healthcare is an unacceptable way to treat some of society’s most vulnerable members—those who are sick and dying with no way to help themselves.

*D. Failure to Combat the Spread of Hepatitis C in Prison Poses a Risk to Public Health*

Disregarding the moral and constitutional implications, failing to treat hepatitis C within the prison system creates tangible, physical problems for those on the outside, especially when a prisoner with untreated hepatitis C is released back into society. Not treating prisoners when they are incarcerated creates a public health concern, as it serves to perpetuate the hepatitis C epidemic on the outside.

About 30% of people with hepatitis C in the United States spend at least part of the year in a correctional institution, and it is estimated that one million people with undiagnosed HCV may come into contact with the prison system every year.<sup>246</sup> More than 90% of these inmates will be released and eventually re-enter the population.<sup>247</sup> When these individuals are released, they unknowingly bring HCV into their communities.<sup>248</sup> However, if prisons provide access to antiviral treatment to individuals during their incarceration, this can not only help decrease the spread of HCV within the prison, but in the individual’s community after release.<sup>249</sup> Randall Berg of the Florida Justice Institute elaborated on the severity of this threat to the health of communities, stating, “[w]hen you have one third of the Florida prison population being released every year, it should be a public health concern that

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<sup>244</sup> See Bondurant, *supra* note 227, at 411.

<sup>245</sup> *Id.* at 414.

<sup>246</sup> See HCV GUIDELINES, *supra* note 82.

<sup>247</sup> *Id.*

<sup>248</sup> *Id.*

<sup>249</sup> *Id.*

these people get treated while they are in prison so when they get out, they don't transmit it to others."<sup>250</sup>

## VI. ACTION REQUIRED TO COMBAT THE HEPATITIS C EPIDEMIC

Drastic steps must be taken immediately in order to quell the spread of hepatitis C in the prison system and prevent needless deaths. Many inmates are battling their prison healthcare providers in the courts, seeking relief in the form of preliminary injunctions, but the judicial process does not produce instant results, and inmates are dying while waiting for judges to write them a favorable opinion.

Action apart from seeking relief from the judiciary is also required to create impactful change. Legislators must be proactive in protecting their constituents by drafting legislation that defends prisoners' inherent dignity as human beings, rather than focusing solely on the bare recognition of prisoners' constitutional rights. Private prison healthcare providers who are directly responsible for the administration of treatment need to craft policy that focuses on detection for those entering the prison system and the immediate administration of DAAs to all prisoners currently suffering from hepatitis C. Activism on all fronts is needed to facilitate the drastic change required to save lives.

### *A. Continue Activism in the Courts*

The American Civil Liberties Union, among other groups of prison-rights advocates, are responsible for spearheading the effort to provide all inmates with the cure for hepatitis C.<sup>251</sup> These groups are suing the individual states' correctional departments, and, if applicable, the private healthcare providers contracted by the state to perform healthcare services in the prison.<sup>252</sup> The plaintiffs are usually current prisoners who are not seeking monetary damages, but rather a preliminary injunction requiring the prison to provide DAAs.<sup>253</sup>

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<sup>250</sup> Klas, *supra* note 99.

<sup>251</sup> See, e.g., Margolies, *supra* note 68; Weill-Greenberg, *supra* note 1; Smith, *supra* note 197.

<sup>252</sup> See, e.g., Postawko v. Missouri Dep't of Corr., 910 F.3d 1030 (8th Cir. 2018).

<sup>253</sup> *Id.*

Most lawsuits seeking preliminary injunctions have been granted class-action status, which means if the preliminary injunction is granted, all prisoners falling into the class would receive treatment, not just those named as plaintiffs in the suit.<sup>254</sup> Due to the change in the standard of care and the high cure rate of DAA medications, many district courts have been granting preliminary injunctions, ordering prison healthcare providers to treat inmates with DAAs regardless of cost. To obtain a preliminary injunction, a plaintiff must show that “they have a substantial likelihood of success on the merits . . . an injunction is necessary to prevent irreparable injury; . . . the threatened injury outweighs the harm that an injunction would cause [the d]efendant; and . . . an injunction would not be adverse to the public interest.”<sup>255</sup>

Although litigation is not the most direct or effective way to combat the hepatitis C epidemic, it is one method that is granting prisoners some relief. Activist groups should continue to assist prisoners in cases against the state denying them medical care, even though the process is tedious and time-consuming. Because of the slow nature of litigation, and the urgent need for treatment, action is needed on other fronts to attempt to obtain treatment for prisoners in a more time-efficient way. Aptly stated by Connecticut attorney DeVaughn Ward, “[i]nstead of fighting the fact that there’s a problem, spend the time figuring out ways to solve it.”<sup>256</sup>

### *B. Create Laws Focused on Dignity*

A method that might see quicker, more direct change is creating laws and policy in the legislative branch. Legislators should be focusing on the dignity of offenders when drafting laws concerning inmate healthcare. An emphasis on constitutional

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<sup>254</sup> See, e.g., Stahl, *supra* note 97.

<sup>255</sup> Hoffer v. Jones, 290 F. Supp. 3d 1292, 1298 (N.D. Fla. 2017) (citing Wreal, LLC v. Amazon.com, Inc., 840 F.3d 1244, 1247 (11th Cir. 2016)).

<sup>256</sup> Josh Kovner, *Hepatitis C Lawsuit Against State Prisons Clears Crucial Legal Hurdles; Could Force More Than \$100M in Screening and Treatment*, HARTFORD COURANT (Aug. 7, 2019, 12:40 PM), <https://www.courant.com/news/connecticut/hc-news-hepatitis-virus-prisons-lawsuit-20190807-jpwwond22rd45kb6ofbow6trsy-story.html> [<https://perma.cc/52H3-DXY6>].

rights is a starting point, but this focus fails to reach far enough to advocate for any real change; instead, we see the wheels of justice turn slowly as Eighth Amendment issues are fought out in the courts. Regulations surrounding the treatment of hepatitis C in prisons should be modeled after the movement in legislation to promote the dignity of incarcerated women and their access to reproductive healthcare.<sup>257</sup> Activists for women's health have called for a focus not on whether incarcerated women are entitled to certain constitutional rights in prison, "but about how all women . . . are entitled to a basic level of humanity and to live lives free from shame."<sup>258</sup> These "Dignity Acts" have received bipartisan support in several state legislatures.<sup>259</sup> Legislators should take this concept and apply it to prisoners suffering from hepatitis C. If these laws are passed at the state level, they could make up for the lack of protections in prison-specific healthcare policy and practices.

The idea that prisoners are entitled to basic human dignity might seem radical in the United States, but it is far from novel elsewhere in the world. Human rights principles shape many other countries' criminal justice policies. For example, Germany's constitution states that "human dignity shall be inviolable," which suggests that all persons have a right to a basic level of humanity.<sup>260</sup> Regardless of the fact that these individuals are incarcerated, they deserve basic human dignity. Policy makers must look beyond simply what bare rights these incarcerated persons are entitled to through the United States Constitution, but at their humanity and how that dignity requires them to be treated.

### *C. Budgets Should Allocate Funds to Ensure Prisoners Receive Treatment*

Elected officials should also draft budgets that prioritize the treatment of prisoners with hepatitis C. If those drafting the budget set aside an adequate amount of money for treatment, less

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<sup>257</sup> See generally Samantha Laufer, *Reproductive Healthcare for Incarcerated Women: From "Rights" to "Dignity,"* 56 AM. CRIM. L. REV. 1785 (2019).

<sup>258</sup> *Id.* at 1804.

<sup>259</sup> *Id.* at 1805.

<sup>260</sup> *Id.* at 1804 n.156.

battles will have to be fought out in the courts, and prisoners could start receiving treatment much sooner. For example, in April of 2019, Tennessee Governor Bill Lee proposed a budget allocation to provide \$25 million to treat hepatitis C in prisons.<sup>261</sup> This budget adjustment will ensure Tennessee inmates are given DAA medication, even despite a judge ruling against plaintiffs seeking an injunction requiring treatment for all inmates with hepatitis C.<sup>262</sup> If other states followed suit, litigation could be halted, and the focus could be redirected to promptly administering treatment to those in need.

*D. Prison Healthcare's Priority Should be to Cure All Inmates with Hepatitis C, Regardless of Cost*

As discussed earlier in this Comment, many states have privatized their healthcare systems. These states contract out prison healthcare services, offering a contract to the company offering the lowest bid, or the lowest overhead cost per inmate. These private healthcare providers should be proactive in drafting their policies in order to ensure inmates with hepatitis C are receiving proper care. These regulations would be the most effective, direct way to create change within prisons that have privatized their healthcare. Unfortunately, because these providers won their contracts because they can provide the lowest cost per head, they are extremely reluctant to participate in any treatment that would see their costs rise and potentially put their contracts in jeopardy.

Prison healthcare providers' first priority should be to eradicate the current epidemic, which can only occur if all inmates suffering from hepatitis C are given DAA treatment. Then, the policy must focus on screening, prevention, and treatment as needed. Treating all inmates now may be costly up-front, but once the model is able to shift from crisis mode in order to focus on

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<sup>261</sup> See Joel Ebert, *Gov. Bill Lee Proposes \$25M To Fight Hepatitis C in Tennessee Prisons, Shifting Money from Voucher Plan*, TENNESSEAN (Apr. 16, 2019, 1:58 PM), <https://www.tennessean.com/story/news/politics/2019/04/16/gov-bill-lee-proposes-nearly-25-m-fight-hepatitis-c-tennessee-prisons-shifting-money-away-vouchers/3483068002/> [https://perma.cc/QK7J-Q2CE].

<sup>262</sup> See Timms, *supra* note 202.

screening and prevention, less money will need to be spent on DAAs and on complications relating to hepatitis C.

Prisons claim concern over wasted DAA medication due to the possibility of re-infection but are not being proactive to help prevent re-infection; instead, they are choosing to withhold treatment altogether. One of the major risk factors for initial infection and reinfection is intravenous drug use, which is rampant within the incarcerated population.<sup>263</sup> An effective method to prevent re-infection would be also treating substance-abuse disorders along with administration of DAAs.<sup>264</sup> It would benefit prisons “to combine harm reduction strategies that improve the safety of injection . . . with interventions that treat the underlying addiction . . . .”<sup>265</sup> Alcohol treatment programs could also “help slow liver disease progression, decrease HCV transmission, and might reduce recidivism.”<sup>266</sup> Combining programs that will help prevent inmates from engaging in high-risk behaviors and DAA treatment would be the best investment for individual health and ensure the cost of treatment is “worth it” to the prison healthcare providers. Only about half of correctional facilities address substance abuse disorders with inmates receiving DAAs.<sup>267</sup>

Since private healthcare providers are troublesome and have proven to be unreliable, having an outside group provide some sort of supervision to ensure proper care is provided might be necessary. Pennsylvania has implemented a system to hold private healthcare providers accountable that other states should follow.<sup>268</sup> Jails in Philadelphia, whose healthcare is provided by Corizon, have partnered with Philadelphia FIGHT, a community health nonprofit.<sup>269</sup> The nonprofit has case managers visit jails each day to meet with inmates who test positive for HCV and

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<sup>263</sup> See HCV GUIDELINES, *supra* note 82.

<sup>264</sup> *Id.*

<sup>265</sup> *Id.*

<sup>266</sup> *Id.*

<sup>267</sup> *Id.*

<sup>268</sup> See Nina Feldman, *Philly Jails to Spend \$9 Million on Hepatitis C Treatment*, WHY (Oct. 30, 2019), <https://why.org/articles/philly-jails-to-spend-9-million-on-hepatitis-c-treatment/> [<https://perma.cc/U8QB-P58Q>].

<sup>269</sup> *Id.*

provide follow-up care.<sup>270</sup> Personal interaction with inmates who have been diagnosed is imperative, as hepatitis C is an extremely serious medical condition, and individuals need to be counseled about what they are facing. Commonly, inmates diagnosed in prison are told they have hepatitis C, but nothing about what that means or what options are available to them, leaving them to make their own conclusions through their own research. Simple education and counseling would drastically increase the quality of life for inmates suffering from hepatitis C.

#### CONCLUSION

The current situation of inmates suffering from hepatitis C is appalling and a concerning reflection of how society views individuals in custody. Although society is communicating to these offenders that they have strayed from what is acceptable, and some form of punishment is required, this does not strip these individuals of basic human rights or of their inherent human dignity. The pain, suffering, and fear that accompanies untreated hepatitis C violates the constitutional rights of prisoners and offends their natural human dignity. Now that an effective cure for hepatitis C is readily available, prisons have a duty to provide basic healthcare for those in their custody.

The cost of ignoring prisoners' suffering is more than a monetary concern. It costs society its dignity for permitting such abysmal treatment of its members. It costs each individual prisoner his dignity, communicating to him that he is no longer worthy of his rights as a human being. It poses a threat to public health and allows hepatitis C to spread in communities. An advanced, first-world country cannot justify this ignorance.

The severe negligence and apathy displayed by prison healthcare providers must be eliminated. The judicial process is bringing victories and change, albeit slowly, and advocacy groups must continue that fight. Legislators need to be proactive and create policies to preserve the dignity of those in the custody of the state. Prison healthcare providers must address the hepatitis C epidemic directly, starting with curing every prisoner suffering from hepatitis C. Effective screening and preventative care must

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<sup>270</sup> *Id.*

also be implemented to stall the continuation of hepatitis C within incarceration facilities. The development of DAAs has given society an opportunity to increase the quality of life for all. If society continues to ignore the preventable suffering and death of its most vulnerable members, it can no longer retain its dignity.